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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, *Petitioner*

v.

FEDERAL MARITIME COMMISSION
UNITED STATES OF AMERICA
and
FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

RESTATEMENT

We disagree with Flota's counterstatement of facts in many particulars, and point out our differences here, referenced to the number headings in Flota's brief.

1. *Flota's inability to obtain shippers.* Flota was "unable" to obtain banana shippers prior to 1955 be-

cause, prior to 1955, it did not have a regular service which banana shippers require (R. 21). It started a regular service in 1955, and its ships then became usable for the banana trade (R. 5-6; 21).

2. *The 1955 contract and option.* Panama Ecuador was not the only shipper interested in Flota's reefer space in 1955; Flota had rejected a bid made by Consolo in 1955 (R. 6). The 1955 exclusive contract was *not* in accordance with prevailing and long standing industry practice. The very case cited by Flota in support of its statement that it was (Fl. Br., p. 4), *Philip R. Consolo* v. *Grace Line,* 4 F.M.B. 293, was decided in 1953, and the Board there held that an exclusive contract by Flota's competitor Grace with a favored banana shipper violated sections 14(4) and 16 of the Shipping Act, 1916. 4 F.M.B. at 304.

3. *Exercise of the option.* The sequence of events is most important; it is correctly given in Consolo's opening brief (pp. 4-5) and the Government's opening brief (p. 4). In February, 1957, Flota told Consolo he could submit a bid for all Flota's refrigerated space (R. 204b-205). In March, 1957, Flota's Board of Directors voted to renew the Panama Ecuador contract, even though they had not yet received Consolo's bid (R. 432-33; 436-37). Thus Panama Ecuador could not have "perfected" any right to exercise its option, because it could not have met the terms of a bidder whose bid was not yet received. In April, 1957, the Board issued its decision in *Banana Distributors* v. *Grace Line,* 5 F.M.B. 278, and in May, 1957, Flota and Panama Ecuador entered into another three-year exclusive dealing contract (R. 187) although Flota admittedly knew about the *Grace Line* decision (R. 152).

In June, 1957, Flota informed Consolo that it had contracted all its space to Panama Ecuador (R. 207).

4. *Consolo's request of August 23, 1957.* Flota pretends Consolo demanded space on Flota after Consolo was thrown off the Grace Line because of the Board's *Grace Line* decision. This is not so. Consolo had been *sharing* space on the Grace Line with other banana shippers since the Board's first (1953) *Grace Line* decision (R. 89), and continued to share space with other banana shippers after the Board's second (1957) *Grace Line* decision (R. 89). Consolo was a shipper on the Grace Line all during the 1957-1959 period (R. 261). As a matter of fact, Panama Ecuador, Flota's favored shipper, obtained a fair share of Grace's space during the 1957-1959 period (as a result of the Board's 1957 *Grace Line* decision) while retaining *all* of Flota's space (R. 155). Consolo was not Grace's favored shipper and did not seek to become Flota's; Consolo wanted a fair share of space on both common carriers.

5. *Flota's dilemma.* The dilemma was self-made. Flota signed an exclusive dealing contract one month after its competitor had been told it must prorate its space fairly among all banana shippers. It signed the contract without seeking advice from the Board because in the words of its operating manager "[I]t is better to deal with one than with three" (R. 162).[1] In any event, Flota could have solved its "dilemma" in 1958, while the hearings were in process. In that year, Panama Ecuador threatened to cancel its contract un-

[1] Flota's general manager testified to the same effect:

"... the board of directors believed it very suitable, very convenient to extend the contract" (R. 434). See Government brief, pp. 46-47.

less Flota reduced its rates. Flota concurred in the reduction (R. 199-204; 499-500).[2]

6. *Flota's attempts to obtain a ruling from the Board.* Flota did not tender the Board a simple legal issue for resolution. Its petition asked for a "declaratory order" after a "full hearing" (R. 37) and at the hearing it contended that its vessels were so different from Grace's that carriage for more than one shipper was a physical impossibility (R. 134). Its briefs to the Examiner and exceptions to the Board argued the same point (R. 472-73; 638-39). Thus any Flota belief that it would obtain a ruling "within a month or two" (Fl. Br., p. 7) did not take into account Flota's own behavior.

7. *The Board's delay and ultimate action.* The Commission found as a matter of fact that Flota either authored or sponsored most of the delays (R. 509).[3] Flota pretends it asked for delays in order to defend the reparation claim only, but, as the Board's decision stated (R. 279), *Flota introduced no proof whatsoever on the reparation calculation.* The "evidence" Flota tendered on reparation consisted chiefly of the testimony of two witnesses concerning the "availability" of chartered vessels (R. 344-57; 361-85). Thus Flota's argument that the case consumed two years because of the reparation claim is disproved on the record.

9.[4] *The Board's reparations award.* The Board did state that Flota should have accepted the Board's 1957

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[2] See Gov't. Br., p. 47.

[3] The Government's opening brief, pp. 49-50, recounts Flota's various bids for delay, and the agency's prompt decisions.

[4] Our numbering follows Flota's; we omit Flota's numbered paragraph which we do not comment upon.

Grace Line decision. Flota's own counsel had agreed. Flota did not defend on the ground that the *Grace Line* decision was wrong, and would be reversed. Rather, Flota's counsel said, in 1957, (R. 134):

> ". . . are there sufficient facts brought before you to distinguish these cases from the Grace Line case which would say that the Grace Line case is good law but inapplicable because of the differences which we have set forth in this proceeding. *That is all we are seeking to learn from the Board.*" (Emphasis supplied).

There was thus no uncertainty as to the "law" in Flota's mind in 1957.

10. *The Petitions for Review in Nos. 16,366 and 16,369.* Consolo did *not* unequivocally urge the Court to take jurisdiction of Flota's petition. Consolo filed a motion (R. 621) to dismiss Flota's petition for lack of jurisdiction (R. 625-30). Consolo argued in the alternative that if the Court had jurisdiction, it must have jurisdiction to enforce the Commission's order, and thus Flota should be required to post a bond (R. 634-35).

11. *The Court of Appeals' first decision.* Mr. Robert E. Mitchell, the Commission's Assistant General Counsel, defended the Commission's order before the Court of Appeals. Mr. Mitchell personally never took any part in the case before the Board; he was Assistant General Counsel at the time Public Counsel intervened in support of Consolo's claim that Flota had to apportion its space fairly among all banana shippers (R. 483). The Office of Public Counsel did *not* intervene in the reparation hearings, did *not* file briefs nor take any position on the merits of the reparation claim

either before the Board or before the Commission on remand.

12. *The Commission's Report and Order on Remand.* Flota's statement (Fl. Br., p. 12) that the Commission's decision on remand found for the first time in six years of litigation that Flota was not acting in good faith is ingenuous. "Good faith" was never in issue before, because the Court of Appeals' decision introduced the novel concept of the "equity" of awarding damages where a violation of the Shipping Act was found and damages proved. The Court of Appeals directed the Commission to consider Flota's protestations of "good faith"; the Commission did so, and found they were unjustified on the record (R. 513).

The Commission's decision on remand reduced the award by accepting two Flota arguments on the reparation calculation; both arguments had been made to the Court of Appeals by Flota, and both arguments had been opposed in the Court of Appeals by Messrs. Pimper and Mitchell who defended the Commission's first decision on appeal (R. 492).

13. *The Petitions for Review in Nos. 18,230 and 18,235 and the Court's second decision.* Flota's petition (No. 18,230) was filed first (R. 670) and Consolo's petition (No. 18,235) was filed second (R. 676). Thus the Court could not have had "ancillary" jurisdiction to entertain Flota's petition.

ARGUMENT

I. THE COURTS OF APPEALS DO NOT HAVE JURISDICTION OF A CARRIER'S SUIT TO REVIEW A MARITIME COMMISSION REPARATION ORDER.

A. Flota's Misconstruction of the Review Provisions of the Shipping Act and the Hobbs Act.

The Hobbs Act (5 U.S.C. 1032) gives the Courts of Appeals exclusive jurisdiction of "such final orders of the United States Maritime Commission . . . as are now subject to judicial review pursuant to the provisions of Section 30 of Title 46 [Shipping Act, § 31] . . ." Section 31, in turn, provides that "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or part, any order of the Federal Maritime Board shall, *except as otherwise provided,* be the same as in similar suits in regard to orders of the Interstate Commerce Commission. . . ." (Emphasis supplied). There are two other sections which provide for enforcement of Maritime Commission orders: § 29 provides for enforcement of non-reparation orders, and § 30 provides for enforcement of reparation orders. *The critical difference between sections 29 and 30 is that there is no review of non-reparation orders under § 29 and there is a review of reparation orders under § 30.* Thus § 29 provides that the Commission, or a party in whose favor a non-reparation order was issued, may apply to a district court for enforcement of the order, and it "shall" be enforced by the district court if "the order was regularly made and duly issued." By contrast, § 30 provides that an entirely new suit be brought in district court on a reparation award, and the reparation order shall be only "prima facie evidence of the facts therein stated" in such suit.

Flota's conclusion that § 31 encompasses a carrier's suit to set aside a reparation order as well as a non-reparation order, rests on the premise that § 31 "did not . . . create a right of review; it was rather a provision for venue and procedure . . ." (Fl. Br., p. 24). But § 31 *did* create a right of review for non-reparation orders: otherwise, any non-reparation order would be enforced under § 29 only upon a showing that it was "regularly made and duly issued". Absent § 31, the losing party would have no right to defend a non-reparation order against enforcement on the grounds, for example, that the agency was applying a wrong rule of law, or that the agency decision was not based on substantial evidence. Absent § 31, the losing party must await an enforcement action in which all the winner need show is that the non-reparation order was in fact the order of the agency. By contrast, absent § 31, there is still a right of review of a reparation order—by defense to a shipper's suit under § 30 in which the award "cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either judge or jury."[5] In short, if a carrier does not seek review of a cease and desist order, it has lost all right of review; if a carrier does not seek review of a reparation order, it has lost nothing.

Therefore, § 31 *does* create a right of review for non-reparation orders, and the exception in § 31—"except as otherwise provided"—must have reference only to § 30, which provides a right of review for reparation

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[5] Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 430, quoted in United States v. Interstate Commerce Commission, 337 U.S. 426, 435.

orders—in a new suit, in district court, and with the order *prima facie* evidence only.[6]

Flota's argument reduces to the proposition that a carrier had a right to review a reparation award in a three-judge court under § 31, and that the Hobbs Act transferred this right to a Court of Appeals. But Flota can point to *no* Shipping Act case, and to no Interstate Commerce Act case in the past 50 years, where such a review was granted.[7] Our opening brief (pp. 18-19) showed that the uniform practice has been for carriers subject to either Act to await suit on the reparation order in district court. As the court stated in *United States* v. *Interstate Commerce Commission,* 198 F. 2d 958, 964, note 2 (C.A.D.C., 1952),[8] cert. denied 344 U.S. 893 "no such [reparation] order has ever been the subject of direct judicial review."

Finally, Flota argues (Fl. Br., pp. 43-49) that a double review is preferable as a matter of policy, and is even an advantage to the shipper. How a shipper can be advantaged by a heads-you-lose, tails-you-don't-

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[6] The Flota argument concludes (Fl. Br., pp. 26, 33) that if § 31 excepts reparation orders under § 30, it must also except non-reparation orders under § 29, and thus be "read out of the statute." (Fl. Br., p. 33). But § 31 does *not* except non-reparation orders under § 29 for the reason given above—there is no real review provided for under § 29. Flota's own incorrect premise—that § 31 does not create a right of review—compels its incorrect conclusion —that § 31 applies equally to both §§ 30 or 29, or to neither.

[7] The exception, of course, is Interstate Commerce Commission v. Atlantic Coast Line R. Co., 334 F. 2d 46 (C.A. 5, 1964), in which certiorari was granted last term. 379 U.S. 957.

[8] This case was on appeal from the district court to which the cause had been remanded by this Court's decision in United States v. Interstate Commerce Commission, 337 U.S. 426.

lose-yet review, we fail to see. In any event, in weighing the policy considerations for reviewing reparation orders, this Court concluded in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 443 that "one judge rather than three should entertain cases challenging Commission reparation orders. . . ."

B. The "Ancillary" Jurisdiction Argument

Both the Government and Flota argue that even if a Court of Appeals does not have jurisdiction to review an award of reparation on a carrier's petition, the court below had a kind of "ancillary" jurisdiction because Consolo petitioned the Court of Appeals to review the order insofar as it denied Consolo the full reparation claimed. Both arguments ignore important procedural facts in this case.

The Government contends that the court below had ancillary jurisdiction because Flota had a right to "intervene" in Consolo's suit and argue that the order was entirely invalid. But Flota did not confine its attack on the order to a defense of Consolo's suit. Flota filed its *own* petition to review, in which it asserted that the Court of Appeals had jurisdiction under the Hobbs Act (R. 670).

The Government notes in a footnote (Gov't. Br., p. 39, n. 30) that Flota filed its own petition, and then dismisses that petition as "not necessary to raise the defense of invalidity and confer jurisdiction on the court. . . ." Having dismissed it as not necessary, the Government discussion ignores the fact that it was

the basis for the Court's assumption of jurisdiction.[9] Thus the factual situation which the Government argues would vest the court of appeals with ancillary jurisdiction is not presented in this case.

Flota bases its ancillary jurisdiction argument on on the statement that "[o]nce the court's jurisdiction was invoked by Consolo and the record filed, the court below had jurisdiction to determine the validity of the orders in question. . . ." (Fl. Br., p. 51). The fact is, however, that on appeal from the Commission's second reparation award, Flota filed its petition first, invoking the jurisdiction of the court (R. 670), and Consolo filed his petition later (R. 676). The court's jurisdiction was invoked by Flota, not Consolo, and Flota's petition can therefore not be considered ancillary.

Although the ancillary jurisdiction arguments do not apply on the facts of this case, we do not contend that the ancillary jurisdictional question should be resolved depending upon whether the carrier attacks the order by intervention or separate suit, or depending upon whether the shipper or carrier files first. Rather, the policy considerations compelling one review in a district court are equally applicable whether the order is attacked because it granted too much or too little

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[9] Thus the Court began its discussion of jurisdiction by stating "Consolo has moved to dismiss Flota's petition in No. 16369 for lack of jurisdiction . . ." (R. 660). The Court then held it had jurisdiction. (R. 661-662). In discussing Consolo's petition in No. 16366 (R. 663-64) the Court sustained the Board's order denying the full amount of reparation claimed, but did not consider any Flota arguments attacking the validity of the order. The court did consider these arguments, but only when considering Flota's petition in No. 16369 (R. 664-67).

reparation.[10] This Court so stated in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 443:

> "The same one-judge trial and appeal procedure available for enforcement of an award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations. For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes. We think the orders in both instances should be reviewed in the same one-judge tribunal."

D. L. Piazza v. *West Coast Line,* 210 F. 2d 947 (C.A. 2, 1954), cert. denied, 348 U.S. 839, held that the shipper *must* attack the adequacy of the award in the Court of Appeals, and thus Consolo was forced to bring his petition to the court below. *Piazza* appears irreconcilable with *United States* v. *Interstate Commerce Commission.* See petitioner's opening brief, pp. 23-24. If *Piazza* is right, however, the fact remains that the carrier can still present all its defenses in the suit in district court which must be brought to secure any reparation, whereas the shipper will never be able to attack the sufficiency of the award unless it

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[10] The Government argues (Gov't. Br., pp. 39-43) that once the shipper's suit is filed, considerations of "economy" support the court's jurisdiction of the carrier's appeal. These "considerations", however, stop short of enforcement of the award: even if the court has complete jurisdiction, the shipper cannot win without bringing another, new suit in District Court. Thus the only real economy that can be achieved is by one suit in district court, in which the carrier can present all his defenses to the order.

brings a review petition in the court of appeals. If the court of appeals has "ancillary" jurisdiction to void the reparation order when considering the shipper's petition to obtain more reparation, then it should have "ancillary" jurisdiction to enforce the reparation order if it sustains the order against the carrier's attack. But the court below neither held, nor does the government here contend, that ancillary jurisdiction vests the court with power to enforce a valid order. Thus ancillary jurisdiction is still a one-way street: it does not enable the court of appeals to dispose of the controversy in one lawsuit.

II. THE COURT BELOW INTRODUCED A NEW STANDARD OF "EQUITY" IN REPARATION AWARDS AND MADE ITS OWN FINDINGS OF FACT ON THE EQUITIES.

A. The New "Equity" Doctrine

The Government takes the position that it is not necessary to decide in this case whether the Commission has power to deny reparation on "equitable" grounds, because the Commission's finding that an award of reparation was equitable was clearly supported by substantial evidence (Gov't. Br., pp. 43-44). Flota contends that the "equity" standard announced by the Court of Appeals was correct.

Flota argues, first, that the Board's 1959 decision, while holding that Flota had violated the Act, did not foreclose the Board from later considering whether Flota's conduct was unjust and unreasonable (Fl. Br., pp. 54-55). Flota says that the court of appeals "employed the word 'inequitable' in the same sense as the statute employs the words 'unfairly,' 'unjustly' or 'unreasonably.'" (Fl. Br., p. 56). The simple answer to this argument is that the Commission found,

and *the court below sustained the finding,* that Flota had violated the statute precisely because its *past* conduct had been unreasonable and unjust (R. 658-59).[11] Thus, the court below held, on appeal from the Board's decision on the merits, that the Board "was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just." (R. 659)[12] Clearly, then, Flota was adjudged guilty of violating sections 14 and 16 of the Shipping Act, 1916, in the *past,* and these sections can only be violated by "unjust" and "unreasonable" past conduct.[13] The standard of "equity" is in addition to the statutory standards of justness and reasonableness, and it is a new, undefined standard.

Flota argues, second, that reparation can be "equitably" denied if an agency is retroactively applying a new rule of law. The short answer to this is that the Board had previously announced the same rule of law in two previous cases involving the same trade and the same commodity. *Philip R. Consolo* v. *Grace Line,* 4 F.M.B. 293 (1953); *Banana Distributors Inc.,* v. *Grace Line,* 5 F.M.B. 278 (1957). The rule that a common carrier is liable for an unjustified refusal to carry is

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[11] Flota did not appeal from that part of the Commission's 1959 decision which required it to open its space to all shippers; Flota appealed only from the Board's decision insofar as it held that Flota had violated the Shipping Act, 1916 (Fl. Br., p. 9, ¶8).

[12] Two years later, the same court held that the exclusive contract and the petition for declaratory order rendered Flota's discriminatory refusal of space "equitable."!

[13] The rate cases cited by Flota (Fl. Br., pp. 55-56) which distinguished between rates held illegal for the future but not for the past, are inapposite. Here there was a finding that *past* conduct was unjust, unreasonable, and hence illegal.

at least as old as the law of common carriage. *The Wildenfels,* 171 Fed. 864 (C.C.A. 2d, 1908).

B. Standards of Judicial Review

In our opening brief, we showed that the court of appeals, instead of considering whether there was substantial evidence to support the Commission's findings, determined on the basis of its own findings that there was more—or substantial—evidence to support Flota's position. Flota protests that the court "recognized . . . that the question was not merely the substantiality of evidence supporting Flota's contention," but Flota cites nothing in the decision which betrays such a recognition (Fl. Br., p. 60). The language of the decision below shows unequivocally that the court was weighing the evidence itself.[14]

The Government brief sets forth the evidence in the record which supports the Commission's finding on each issue of fact (Gov't. Br., pp. 43-45). Flota responds (Fl. Br., pp. 61-62) that the appellate court's review of the agency's findings should not be considered by this Court. That argument has been disposed of by the grant of certiorari on all issues, including whether "the Court of Appeals appl[ied] a proper standard for review in setting aside the order by making its own contrary findings of fact?"[15]

Flota also says that the Court of Appeals' findings of fact were correct (Fl. Br., pp. 62-64). The point

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[14] For example, the Court below said: " . . . the Commission's determination ignores . . . the substantial *weight* of the evidence. . . . (R. 689; emphasis supplied). And again: "In view of the substantial evidence showing that it would be inequitable to assess damages against Flota. . . ." (R. 698).

[15] Petition for Writ of Certiorari, p. 3.

remains, however, that under established principles of agency-court review, the proper inquiry is not whether other findings could have been made, but whether the agency's findings were supported by substantial evidence. The evidence, as set forth in the Government's brief, proves that they were. Accordingly, the Commission's decision should have been sustained.

Last week this Court, reversing a Court of Appeals decision which had in turn reversed a Federal Trade Commission order, restated the correct standard for review:

> "There was substantial evidence in the record to support the Commission's finding; its determination that the practice here was deceptive was neither arbitrary nor clearly wrong. The Court of Appeals should have sustained it." *Federal Trade Commission* v. *Mary Carter Paint Co.*, 34 L.W. 4005, October Term, 1965, No. 15.

This is the long-established rule: the agency's decision must be sustained if there is substantial evidence to support the agency's findings. The agency's decision should not be reversed because the court of appeals preferred to believe the offender's explanations.

III. THE ADDITIONAL ISSUES RAISED BY FLOTA DO NOT SUPPORT THE DECISION BELOW.

A. The Commingling of Functions Argument

Flota's argument (Fl. Br., pp. 65-66) respecting an "improper commingling" of functions omits several critical facts.

1. Mr. Mitchell was Assistant General Counsel at the time the 1958 hearings on the merits were held, and as such his name was on Public Counsel's brief

(R. 483). Mr. Mitchell did not participate in the hearings (R. 71-169; 283-325; 557-606). Mr. Pimper was unconnected in any way with Public Counsel's participation on the merits. (R. 483; 71-169; 283-325; 557-606).

2. Neither Mr. Pimper, Mr. Mitchell, nor any other Commission employee intervened in the 1960 reparation hearings (R. 326-441; 607-616); nor did Mr. Mitchell, Mr. Pimper or any other Commission employee file briefs on or orally argue the reparation claim to the Commission either before the Commission's first reparation decision (R. 269-72) or after remand (R. 501; 618).

3. Mr. Pimper and Mr. Mitchell defended the Commission's orders on the merits and reparation against the attacks of *both* Flota and Consolo (R. 651; 686).

4. The Minutes of a Commission meeting of October 29, 1962, (held after the Commission had heard oral argument pursuant to the remand) show that the Commission's General Counsel, Mr. Pimper, was present, and the Commission directed its General Counsel to prepare a "proposed report and order in accordance with the instructions given at this meeting." (R. 526).

5. The next Minutes show that at a meeting of the Commission on September 16, 1963, at which Mr. Pimper and Mr. Mitchell were present, "The Commission considered draft of proposed Report and Order . . . which had been prepared pursuant to instructions given by the Commission . . . copies of which had previously been distributed to the Commissioners. After discussion, . . . the Commission adopted the Report and Order." (R. 527)

6. The new report and order reduced the award by accepting two Flota arguments on the reparation calculation; both arguments had been made to the Court of Appeals by Flota, and both arguments had been opposed in the Court of Appeals by Mr. Pimper and Mr. Mitchell.

We submit that these facts show no improper "commingling"; that neither Mr. Pimper nor Mr. Mitchell participated in the reparation claim other than as Commission attorneys defending the Commission decision in Court and preparing a second Commission decision in accordance with Commission instructions. The Commission's attorneys could be no more wedded to the first Commission decision nor biased against Flota than the Commissioners themselves.

Moreover, even if Messrs. Pimper and Mitchell had participated in the reparation case before the Board—which they did not—there would be no constitutional or statutory infirmities in their participation in the Board's deliberations:

> "We hold that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, . . . the Commission's own rules, as well as constitutional due process." *Wilson and Co.* v. *United States,* 335 F. 2d 788, 796 (C.A. 7, 1964), cert. denied, 380 U.S. 951.

B. The Measure of Damages Argument

Flota argues that the Commission's measure of damages—difference between market price at destination and market price at origin, less cost of transportation — was wrong. Flota says that the measure of damage should be how much "worse off" Consolo was because Panama Ecuador used Flota's space. This measure is lifted from the line of cases beginning with *Interstate Commerce Commission* v. *United States,* 289 U.S. 385, which held that where two shippers are charged different rates, and neither is the legal rate, the measure of damage is how much worse off one shipper is because his competitor paid less.[16] If the rate discrimination measure were applied to space discrimination, then the shipper's damages would decrease in proportion to the extent of the discrimination. At the point where the discrimination was total, as here, the damages would be zero, because the excluded shipper never had an opportunity to compete with the favored shipper. Under Flota's measure of damages, a total exclusion is a total excuse.

The Flota measure was not accepted by the Commission,[17] and has never been used by the courts. All refusal to carry or space discrimination cases have measured the shipper's damages by the amount he

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[16] Of course, if a rate is illegal in and of itself, the measure of damage is the difference between the rate charged and a lawful rate. Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531.

[17] The Commission was directed, under § 22 of the Shipping Act, to award "full reparation to the complainant for the injury caused by such violation." The violation here was exclusion, and the injury was loss of profits on cargo excluded.

would have earned if his goods had been carried, or, if space was insufficient to carry all his goods, by the amount he would have earned if he had been given his fair share of space. *The Wildenfels,* 161 Fed. 864 (C.C.A. 2d, 1908), cert. denied, 215 U.S. 597; *Swayne & Hoyt* v. *Everett,* 255 Fed. 71 (C.C.A. 9th, 1919); *Pennsylvania R. Co.* v. *Weber,* 257 U.S. 85; *Baltimore & O. R. Co.* v. *Brady,* 288 U.S. 448; *Midland Valley R. Co.* v. *Excelsior Coal Co.,* 86 F. 2d 177 (C.C.A. 8th, 1936); *Hernandez* v. *Bernstein,* 116 F. 2d 849 (C.C.A. 2d, 1941). The Court of Appeals' statement in its first opinion that the Board's measure of damages was "harsh" (R. 667); and its statement in its second opinion that Consolo suffered "only the loss of speculative profits" (R. 690) show that, as the court below itself stated, it thought the reparation remedy inappropriate and of declining importance (R. 690).[18] If this Court considers Flota's arguments about the measure of damages, it should affirm the measure used by the Commission.

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[18] The Government's brief, pp. 51-52, n. 38, shows that the measure of damages questioned by the court below is the usual, appropriate measure for refusal to carry cases.

CONCLUSION

The decision below should be reversed on each of the three grounds urged by petitioner, and the case remanded to the Court of Appeals for the District of Columbia Circuit with instructions to dismiss Flota's petition for review.

Respectfully submitted,

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